APPEAL NO. 043110
FILED JANUARY 31, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on November 4, 2004. With regard to the disputed issues the hearing officer determined that the respondent (carrier) has not waived the right to contest the diagnosed chronic left lumbar posterior ramus radicular syndrome with multilevel L3-S1 degenerative disease and facet arthropathy, partial L4-S1 segmental rigidity, deconditioning syndrome, and chronic pain syndrome (referred to collectively as the claimed conditions), and that the carrier had no duty to dispute the claimed extent of injury in accordance with Sections 409.021 and 409.022. The hearing officer also determined that the compensable injury of _____, does not include the claimed conditions; that the appellant (claimant) had disability from May 29 through December 4, 2003; that the claimant reached maximum medical improvement (MMI) on December 4, 2003; and that the claimant's impairment rating (IR) is five percent.

The claimant appeals, contending that the compensable injury does include the claimed conditions; that the carrier has waived the right to contest parts of the claimed conditions; that she reached MMI on June 10, 2004, in accordance with the designated doctor's amended report; that the hearing officer failed to address disability after December 4, 2003, "[p]resumably because the Hearing Officer found MMI on December 4, 2003;" and that the claimant had disability from December 5, 2003, through June 10, 2004, which "was the period of time actually in dispute." The carrier in a response, timely as a response but untimely as a request for review, contends that the Appeals Panel has incorrectly interpreted TIG Premier Insurance Company v. Pemberton and Texas Workers' Compensation Commission, 127 S.W.3d 270 (Tex. App.-Waco 2003, pet denied) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3) and otherwise urges affirmance.

DECISION

Affirmed in part; reversed and rendered in part and reversed and remanded in part.

The parties stipulated that the carrier accepted a compensable lumbar strain injury and it is undisputed that on _____, the claimant sustained the compensable lifting injury. Initial medical records beginning with an emergency room visit on _____, and (Dr. T), a chiropractor's notes of June 30 through July 30, 2003, fail to reflect any of the claimed conditions. A Work Status Report (TWCC-73) of June 19, 2003, diagnoses an "acute L/S strain" and places claimant on light duty for six to eight weeks. An MRI performed on July 9, 2003, indicated a 2 mm annular bulge at L3-4 and L4-5 to "slightly efface the thecal sac." A report dated July 18, 2003, from a referral doctor has a diagnosis of "Lumbar facet traumatic arthritis."

Our review of the record indicates that (Dr. J) is the designated doctor. In a report dated December 4, 2003, Dr. J certified MMI on that date with a zero percent IR using the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000). (Dr. P), a treating doctor, reviewed Dr. J's report, and in a report dated December 22, 2003, expressed on opinion that the claimant was not at MMI, that Dr. J had not indicated a Diagnosis-Related Estimate (DRE) Category, and that Dr. J's report was internally inconsistent (giving both a two percent whole person impairment for the right leg and a zero percent IR). The Texas Workers' Compensation Commission (Commission) sent Dr. P's report to the designated doctor with a cover letter dated January 30, 2004, asking Dr. J to review Dr. P's December 27, 2003, report. Dr. J replied in an undated letter (referencing the January 30, 2004, request) stating that the claimant "will need re-evaluation to reassess the [IR] component" and that the claimant "was assigned a 0% whole person [IR] because her hip range of motion was invalidated due to submaximal effort. However, unless the claimant has undergone surgery or any new treatments (conservative or otherwise), her MMI date will not change." The claimant had been in the PRIDE rehabilitation program in latter 2003 and an effort was made to place the claimant in the PRIDE program in April 2004 (Dr. P's note of April 27, 2004), but was placed on "administrative hold" because of the carrier's denial.

Dr. J reexamined the claimant on June 10, 2004, and issued two reports both dated June 16, 2004. In one report Dr. J certified MMI on June 10, 2004, with a five percent IR, rating the claimed conditions assessing DRE Lumbosacral Category II: Minor Impairment. In the other report Dr. J certified MMI on June 10, 2004, with a zero percent IR, rating a lumbar strain/sprain only and assessing DRE Lumbosacral Category I: Complaints or Symptoms.

Much of the hearing officer's Background Information section dealt with a discussion of the Pemberton, *supra*, case and the Appeals Panel interpretation of that case and Rule 124.3.

EXTENT OF INJURY

In evidence were reports from Dr. T, and two referral doctors which would support the claimant's contention that the compensable injury included the claimed conditions. Contradictory evidence from a carrier required medical examination doctor, and a peer review doctor indicates that the claimant's extent of injury is a "lumbosacral sprain" or a resolved "minimal lumbar injury" with the exception of lumbar degenerative disc disease which was an ordinary disease of life. With conflicting medical evidence it was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). This is equally true of medical evidence. (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The hearing officer's determination on the extent-of-injury issue is supported by sufficient evidence and is affirmed.

CARRIER WAIVER

The claimant's date of injury was _____. The Employer's First Report of injury or Illness (TWCC-1) is dated _____, and identified the injury and body part injured as a low back, "lumbar & lumbo-sacral" strain. The Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated November 26, 2003 (apparently not filed with the Commission until March 24, 2004), indicated the carrier received the first written notice on _____, and asserted that the "compensable injury is limited to the lumbar sprain/strain as originally reported on the first report of injury." As previously mentioned, the hearing officer discussed the Pemberton case and Texas Workers' Compensation Commission Appeal No. 040918, decided June 10, 2004; Texas Workers' Compensation Commission Appeal No. 041097, decided June 23, 2004 and Texas Workers' Compensation Commission Appeal No. 041738-s, decided September 8, 2004. The hearing officer cited, and followed, the standard set out in Appeal No 041738-s, *supra*, which states:

> We hold that the injury that becomes compensable by virtue of waiver is not necessarily limited by the information listed on the first written notice of injury. Rather the nature of the injury will be defined by that information that could have been reasonably discovered in the carrier's investigation prior to the expiration of the waiver period.

The hearing officer then reviewed the medical records and commented that none of the medical records or other documents dated prior to July 28, 2003 (60 days after written notice to the carrier) "showed any pre-existing conditions were aggravated or that her injury had included [the claimed conditions.]" The claimant generally appeals the determination that incorporates the hearing officer's comment without specifying which reports or documents contradict the hearing officer's finding. We affirm the hearing officer's determination on the carrier waiver issue.

As noted in the concurring opinion, because the compensable injury in this case occurred prior to September 1, 2003, Section 409.021 as it existed prior to being amended on September 1, 2003, applies. There is no evidence that the carrier took any action under Section 409.021(a) within 7 days after receiving written notice of the injury on _____, to entitle the carrier to the 60-day period provided for in Section 409.021(c) to investigate or deny compensability. *See* Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002). The waiver period for this case was 7 days from receipt of written notice of injury, and not 60 days.

The carrier's response cites Pemberton and asserts that the Appeals Panel has misapplied or misinterpreted Pemberton and Rule 124.3. It is apparently the carrier's position that it is only obligated to accept whatever injury the employer chooses to list on the TWCC-1, regardless of the injury that is being treated by the doctors. We disagree, but in any event, in this case, as we have previously noted, the carrier's timely response was not timely as an appeal of the hearing officer's application of Appeal No.

041738-s, *supra*, and we decline to address it further in this case, particularly as the carrier has prevailed on this issue.

MMI

The designated doctor initially saw the claimant on December 4, 2003, and certified MMI on that date with a zero percent IR. In an undated (some time after January 30, 2004) letter of clarification, the designated doctor stated the claimant would need reevaluation for the IR and unless the claimant has had "new treatments (conservative or otherwise), her MMI date will not change." Although the claimant alleges that Dr. J was "provided the medical records from the PRIDE program" the evidence suggests that in early 2004 the claimant's reentry in the PRIDE program was on "administrative hold" due to the carrier's denial of compensability of the claimed conditions. Nonetheless by letter of April 28, 2004 (claimant Exhibit 11 page 3) the Commission advised Dr. J that the "parties agree" to a reevaluation for "MMI date and IR" for both a simple strain/sprain and another report for the claimed conditions. *See* Rule 130.6(d)(5). Dr. J did as requested and certified MMI as June 10, 2004, on both reports and assessed a zero percent IR for the "Lumbar Strain/Sprain Only."

The hearing officer, without discussion of her reasoning or rationale determined that the claimant "attained [MMI] on December 4, 2003," and that Dr. J "assessed a five percent (5%) [IR] in her amended report." Both reports of June 10, 2004, certify MMI on that date with the report including the claimed conditions, which the hearing officer found not to be included, assessing a five percent IR while the report for the lumbar/sprain only having a zero percent IR. The hearing officer specifically found that the great weight of the other medical evidence does not overcome the presumptive weight to be accorded the amended report of the designated doctor.

We hold that the hearing officer erred in finding MMI on December 4, 2003, because the designated doctor, in her amended report, certified June 10, 2004, as the date of MMI. Having found that the great weight of the medical evidence did not overcome the presumptive weight of the designated doctor's report, the hearing officer should have concluded that the claimant reached MMI on June 10, 2004, as assessed in the designated doctor's amended report. *See also* the concurring opinion. We reverse the hearing officer's determination that the MMI date is December 4, 2003, and render a new decision that the claimant's MMI date is June 10, 2004, as certified by the designated doctor whose opinion is not contrary to the great weight of the other medical evidence.

Section 410.204 provides that an Appeals Panel shall issue a decision that determines each issue on which review was requested. Although neither party appealed the five percent IR determined by the hearing officer, we are mandated in the instant case to address the IR determination. The hearing officer's decision contains findings of fact that are on their face inconsistent with the conclusions of law and decision reached by the hearing officer. Both extent of injury and MMI were appealed. The hearing officer determined that the claimed conditions were not part of the

compensable injury, and that determination has been affirmed. The hearing officer additionally found that the great weight of the other medical evidence does not overcome the presumptive weight to be accorded the amended report of the designated doctor. Inexplicably, despite these findings, the hearing officer then concluded the MMI date was the date given in the initial report of the designated doctor (a determination that was reversed and rendered for the reasons stated herein) and determined that the IR was the rating given by the designated doctor which included the claimed conditions the hearing officer found not to be part of the compensable injury. The only IR with the determined date of MMI for the compensable injury was Dr. J's zero percent IR. Even though IR was not appealed, under the circumstances where the hearing officer's findings are internally inconsistent with the determinations and where an IR determination was based on a rating that included conditions which were expressly determined not to be part of the compensable injury, we have no choice but to address the IR issue. We note that a somewhat analogous situation is addressed in the rules when the finality of the first certification of MMI and/or assignment of IR is an issue. Rule 130.12(a)(4) provides that whichever rating from the designated doctor that applies to the compensable injury once an extent-of-injury dispute has been resolved may become final if not disputed. We cannot allow an IR which has no underlying basis in fact or support in the evidence to stand. Accordingly, we must reverse the determination that the claimant's IR is five percent and render a new decision that the claimant's IR is zero percent for the compensable injury as assessed by the designated doctor in the June 10, 2004, amended report.

DISABILITY

Disability is defined in Section 401.011(16) as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. In a workers' compensation case, disability may be established by the claimant's testimony alone, if believed by the finder of fact. (Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.).) In this case the hearing officer determined that the claimant had disability from May 29 through December 4, 2003. Why the hearing officer ended disability on December 4, 2003, is not clear except that is the date that Dr. J initially found the claimant at MMI (and the date the hearing officer found the claimant reached MMI). In fact disability and MMI are two different concepts and disability can extend past MMI although the employee would not be entitled to temporary income benefits (TIBs) after MMI has been attained. Sections 408.101 and 408.102; Texas Workers' Compensation Commission Appeal No. 041298, decided July 12, 2004. We would further note in evidence are TWCC-73s from Dr. P taking the claimant off work from November 25, 2003, to an estimated date of February 25, 2004 (for "lumbar"), from January 6 through March 6 (estimated) 2004, (for lumbar) from February 17 through May 17, (estimated) 2004, (for "low back") and a return to work without restrictions on October 11, 2004. Other TWCC-73s take claimant off work in 2003. On the other hand, in evidence are surveillance videotapes (and reports) showing the claimant performing certain activities on August 27, 2003, May 22, 2004, and June 5, 2004, that the hearing officer may want to consider. The hearing officer's determination that disability ended on December 4,

2003, is not supported by the evidence and is reversed. The case is remanded for the hearing officer to determine dates of disability supported by the evidence.

The hearing officer's determinations on the extent-of-injury and the carrier waiver issues are affirmed. The hearing officer's determinations of MMI and IR are reversed and a new decision is rendered that the claimant reached MMI on June 10, 2004, with a zero percent IR as assessed by the designated doctor whose amended report of June 10, 2004, was found not to be overcome by the great weight of the other medical evidence. The hearing officer's determination of disability is reversed and the case is remanded for the hearing officer to make a determination of disability supported by the evidence. No further hearing on remand is necessary although at the hearing officer's discretion argument on disability alone may be entertained.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS STREET, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701-2554.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Margaret L. Turner
Appeals Judge

CONCURRING IN PART AND DISSENTING IN PART:

I concur in affirming the hearing officer's determinations that the compensable injury does not include the claimed conditions and that the carrier did not waive its right to contest the claimed conditions. Because the compensable injury in this case occurred prior to September 1, 2003, Section 409.021 as it existed prior to being amended September 1, 2003, applies. There is no evidence that the carrier took any action under Section 409.021(a) within 7 days after receiving written notice of the injury on _____, to entitle the carrier to the 60-day period provided for in Section 409.021(c) to investigate or deny compensability. *See* Downs, *supra*. Consequently, I believe the waiver period was 7 days from the carrier's receipt of written notice of injury, and not 60 days.

I also concur in reversing the hearing officer's determination that the date of MMI is December 4, 2003, and in rendering a decision that the claimant reached MMI on June 10, 2004, as was certified by the designated doctor in the amended reports. However, I do not do so simply on the basis that the designated doctor issued amended reports. I do so on the basis that the hearing officer found that the great weight of the other medical evidence did not overcome the presumptive weight to be accorded the amended report of the designated doctor. The MMI date was a factual determination to be made by the hearing officer. Having found that the great weight of the medical evidence did not overcome the presumptive weight to be afforded the designated doctor's amended report, the hearing officer should have concluded that the claimant reached MMI on June 10, 2004, as was reported in both of the designated doctor's amended reports.

I also concur in remanding the disability issue to the hearing officer because the hearing officer ended disability as of December 4, 2003, apparently based on an MMI date of December 4, 2003, and we are reversing the MMI date.

I respectfully dissent with regard to reversing the five percent IR. Neither party appealed the five percent IR and it is an IR in evidence as of the June 10, 2004, MMI date. With no appeal of the five percent IR, I would hold that the IR is final under Section 410.169. *See* Section 410.204(a).

_____
Robert W. Potts
Appeals Judge